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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 578

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

and

BRIEF FOR PETITIONERS

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INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI

I. Statement 2

II. Jurisdiction 9

III. Specification of Errors 9

IV. Questions Presented 11

V. Reasons Relied on for Allowance of the Writ 12

BRIEF IN SUPORT OF PETITION

Opinion Below 14

Statutes and Regulations Involved 14

Summary of Argument 15

Argument 17

I. Section 1347.14(d) of Maximum Price Regulation No. 30 should be adjudged invalid from July 16 to September 11, 1943 17

A. During that period it failed to meet the express requirements of Section 2(j) of the Act 17

B. Congress intended by enacting Section 2(j) that existing regulations should not have validity unless the conditions imposed by that section were met 20

C. The Administrator recognized on September 11, 1943, the actual intention of Congress... 21

II. Petitioners had been deprived of due process of law 23

Conclusion 25

Appendix I 27

Appendix II 35

PAGE

CITATIONS.

Cases:

Mahler, et al. v. Eby Inspector in Charge Immigration Service, etc., 264 U. S. 32 ..... 12, 19

Panama Refining Co. v. Ryan, 293 U. S. 388 ..... 12, 19

Thomas Paper Stock Co. v. Bowles, 148 F. 2d 831 .. 2, 12

United States v. B. & O. R. Co., 293 U. S. 454 .... 12, 19

United States v. Pepper Bros., 142 F. 2d 340 23

Wichita Railroad & Light Company v. Public Utilities Commision of the State of Kansas, et al., 260 U. S. 48 ..... 12, 19

Yakus v. United States, 321 U. S. 414 23

Statutes and Regulations:

Emergency Price Control Act of 1942, as amended:

Section 2(b) 20, 21

Section 2(j) 1, 4, 7, 10, 11, 12, 17, 18, 20, 24, 27

Section 203(a) 2, 4, 5, 6, 15, 16, 23, 24, 27

Section 204(a) 2, 28

Section 204(b) 30

Section 204(d) 9, 30

Section 204(e) 2, 3, 4, 6, 11, 15, 16, 23, 24, 31

Judicial Code, Section 240 (28 U.S.C., Section 347) .9

Maximum Price Regulation No. 30 (7 F.R. 9732) 2, 4, 7, 9, 15, 17

Supplementary Order No. 64 (8 F.R. 12554) 7, 14, 21

Statement of reasons involved in the issuance of Supplementary Order No. 64 ..... 14, 21, 35

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, petition this Court for a writ of certiorari to review a judgment of the United States Emergency Court of Appeals dismissing petitioners' complaint there; and in support of this petition respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a companion case to *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831 (E.C.A.), in which certiorari was granted on June 4, 1945, and which is pending at the present term as No. 67. A writ of certiorari in the present case and its consolidation with No. 67 are sought for the reasons hereinafter stated.

In No. 67, the court below refused to accord petitioners a review under §204(a) of the Emergency Price Control Act of the Administrator's denial of a protest under §203(a) of the Act, the protest having been filed prior to the incorporation of §204(e)(1) into the Act.

The protest asserted that §1347.14(d) of Maximum Price Regulation No. 30 constituted an invalid standardization of unsorted wastepaper from July 16, 1943, the date of the enactment of §2(j) of the Act (known as the Taft Amendment) until September 11, 1943, the date on which the Price Administrator made the determination required by §2(j)(3) of the Act as a condition precedent to the standardization effected by §1347.14(d) of the Regulation.

Petitioners are under indictment, and they have been sued for treble damages, on account of sales of unsorted waste paper made between July 16 and September 11, 1943, allegedly in violation of the protested provision of the Regulation (R. 4-5).

In the decision under review in No. 67, it was suggested that petitioners might apply to the District Court having jurisdiction of the criminal case involving the pro-

tested Regulation for leave to file a complaint in the Emergency Court of Appeals under §204(e)(1) of the Act, presenting the same objection to the validity of the Regulation during the period of July 16 to September 11, 1943, as that presented in the protest. The court below said, 148 F. 2d at page 842:

> We may consider that objection upon its merits only if and when a complaint asserting it is filed under Section 204(e)(1) with leave of the United States District Court for the Northern District of Illinois after the complainants satisfy that court that the objection is asserted in good faith and that there is reasonable and substantial excuse for the complainants' failure to present it in a protest filed before September 11, 1943. In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944 *it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.* (Emphasis added.)

In view of the foregoing suggestion, an application for leave to file a complaint under §204(e)(1) was made by petitioners (R. 7), but it was not acted upon immediately by the District Court. The petition for certiorari in No. 67 was then filed. Subsequently the District Court granted the leave applied for (R. 9); and this Court (after being informed of the District Court's action) granted the petition for certiorari. (See chronological statement in Appendix II of Brief for Petitioners in No. 67, pp. 22-27.)

The District Court, in its order granting leave to file the complaint under §204(e)(1), followed the lead of the Emergency Court's opinion by finding that the objections to the validity of the Regulation were made in good faith, and that there was reasonable and substantial excuse for defendants' failure to present such objections in a protest

filed in accordance with §203(a) of the Emergency Price Control Act" (R. 14)—a finding which has meaning only in relation to the construction of §203(a) adopted by the Emergency Court in the decision under review in No. 67, since it has always been petitioners' contention, as argued in No. 67, that they *had* presented their objections in a protest filed in accordance with §203(a).

The present case was, upon the basis of said finding and in line with the Emergency Court's suggestion, initiated by a Complaint (R. 1) filed under §204(e)(1); and, like the protest originally filed under §203(a), it attacked §1347.14(d) of Maximum Price Regulation No. 30 as having been invalid from July 16 to September 11, 1943.

The Decision in the Present Case

The Government moved to dismiss the complaint upon the merits (R. 16). The motion was sustained, and the court below in its decision (R. 50-53) passed upon the merits of the question which it had declined to consider in 148 F. 2d 831. It held that §1347.14(d) of Maximum Price Regulation No. 30 was valid during the period July 16 to September 11, 1943, *regardless of the fact that during the period in question the Administrator had not made the express determination required by the Congress in §2(j)(3) of the Act as a condition precedent to the standardization effected by the provision in question.* Judge Lindley dissented, stating that to subject a person to criminal and civil penalties during a period when the Regulation did not meet the express requirements of the Act did not comport with his conception of due process of law. Judge Lindley, as will appear from his dissenting opinion, relies upon decisions of this Court holding that if a citizen is to suffer a penalty for the violation of a legislative or-

der or regulation of an executive officer, *due process of law* requires that it shall appear that the order or regulation is within the authority of the officer to promulgate and, if that authority depends upon determinations of fact, those determinations must be affirmatively shown. He considers the history of the legislation in question and concludes that the Congress intended by the Taft Amendment that no regulation, new or *existing*, standardizing commodities should have *validity* until the requisite determination had been made by the Administrator. A fuller statement of the particular question involved in the present case is set forth below under the caption, *The Substantive Issue.*

With reference to the question of due process, it was said in the majority opinion that because petitioners had not filed a protest under §203(a) "during the time it was open to them by protest to question the validity of the regulation"; they could not assert "that they were denied due process by the failure of the Administrator to make his determination before they violated the regulation"—completely forgetting what the court itself had emphasized in its earlier decision: *the good faith of petitioners' objections to the Regulation and the justifiable delay in not filing a protest during the period of the Regulation's claimed invalidity, i. e., between July 16 and September 11, 1943.* It is petitioners' contention, moreover, that they had filed a timely protest under §203(a); and this phase of the matter is under review in No. 67.

The decision in the case at bar is thus made to turn not simply upon the *merits* of the objection to §1347.14(d) of the Regulation, but equally upon the question of the *timeliness* of that objection—and the latter question will not be resolved until this Court's disposition of No. 67, in which it presents the principal issue.

The two cases have thus become inextricably linked. Moreover, the reasoning in the two is contradictory. As will become evident upon analysis, the conclusion of the majority opinion under review in No. 67—i.e., that petitioners could obtain the same relief under §204(e)(1) as under §203(a), has been effectually undermined by the conclusion implicit in the present decision—i.e., that a complaint under §204(e)(1) is not as meritorious as a protest under §203(a).

A further complicating factor is that Judge Laws dissented in the first case and Judge Lindley in the second, *the respective dissents each asserting that petitioners have been deprived of due process of law.*

The Substantive Issue

The substantive issue in the case at bar, dissociated from the complexities injected by the Emergency Court's contradictory pronouncements with respect to the procedural issue already under review in No. 67, may be stated as follows:

Section 1347.14(d) of the Regulation fixes the maximum price for *all types* of unsorted wastepaper *regardless of grade* in terms of a specification or standard, "No. 1 mixed paper" (R. 2).

Prior to the Regulation, the specification or standard in question was not in general use in the wastepaper industry, and it had not previously been promulgated by another Government agency. The price of unsorted wastepaper had always varied in relation to the materials contained in a particular lot, each lot being of a different value from every other lot (R. 2).

Complainants' business consists in large part in dealing in printers' unsorted wastepaper, which is made up of

clippings of new paper from printers' cutting machines, and consists of unbleached and bleached sulphite and soda pulp, which, by reason of its high quality, is manufactured into book and bond paper. This type of unsorted wastepaper has always been distinguished from a lower grade of unsorted wastepaper obtained from office buildings, department stores, etc., which is used to manufacture box board and paper board (R. 3).

The Price Administrator was prohibited by 2(j) of the Emergency Price Control Act, known as the Taft Amendment, enacted on July 16, 1943, from promulgating §1347.14(d) of the Regulation, which had the effect of establishing a single maximum price for all types of unsorted wastepaper regardless of grade, without first making the determination expressly required by 2(j)(3) that no practicable alternative exists for securing effective price control. The Price Administrator did not make such a determination until September 11, 1943, when he issued Supplementary Order No. 64 (8 F. R. 12554) by which he amended the preamble to Maximum Price Regulation No. 30 by adding thereto the following sentence:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

It was explicitly provided in Supplementary Order No. 64 that it "shall become effective September 11, 1943". It is evident from the use of the present tense in the determination "that no practicable alternative *exists*", as

well as from the express provision making the determination effective on September 11, 1943 (the same day it was issued) that the determination related only to the situation as it existed on September 11, 1943—the order being silent as to whether there existed any practicable alternative prior to that date.

It is petitioners' contention that because the express determination required by statute was not made until September 11, 1943, and because the determination itself, when made, spoke only as of the latter date, there was no lawful basis, after the enactment of the Taft Amendment and until September 11, 1943, for the standardization effected by §1347.14(d) of the Regulation.

The arguments supporting petitioners' contention are more fully set forth in the annexed Brief, *infra*, pp. 14-24.

The majority opinion of the court below completely begs the real question. The opinion makes two erroneous assumptions: (1) that the record discloses that there was no practicable alternative for the standardization during the period from the issuance of the Regulation until September 11, 1943—whereas, as we have shown, the record is wholly silent as to that; and (2) that the Regulation's validity "depended upon whether it could reasonably be said that the use of the specification or standard was the only practicable method for securing effective price control of unsorted wastepaper"—whereas the validity actually depended upon an administrative determination made pursuant to the requirements of the statute.

It was said in the dissenting opinion of Judge Lindley: "I can conceive of no justification for not declaring invalidity as of the time of the effectiveness of the (Taft) amendment, lasting until the determination was made.

Otherwise the Administrator might proceed to enforce the regulation in its original form, without making the determination required by the legislature. In such case Congress's mandate would become entirely meaningless." Judge Lindley added that the result reached by the majority opinion did not comport with his conception of due process of law.

A more complete analysis of the case is submitted in the annexed Brief.

II.

BASIS OF JURISDICTION.

The judgment of the Emergency Court of Appeals sought to be reviewed was entered on October 5, 1945. The jurisdiction of this Court is invoked under §204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U.S.C. App. Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U.S.C. Sec. 347).

III.

SPECIFICATION OF ERRORS TO BE URGED.

The Emergency Court of Appeals erred in the following respects:

1. In holding that §1347.14(d) of Maximum Price Regulation No. 30 was not invalid between July 16 and September 11, 1943.

2. In holding that notwithstanding the enactment of the Taft Amendment on July 16, 1943, a then extant price regulation employing a standard which was not previously in general use in the industry and which had not been promulgated by another Government agency, is to be deemed valid despite the failure of the Price Administrator to make the determination required by the Taft Amendment that there was no practicable alternative to effective price control.

3. In holding that the validity of the Regulation between July 16 and September 11, 1943, "depended upon whether it could reasonably be said that the use of the specification or standard was the only practicable method for securing effective price control of unsorted wastepaper", regardless of the absence of an administrative determination of that fact pursuant to the requirements of §2(j)(3) of the Act.

4. In holding that the record discloses that there was no practicable alternative for securing effective price control from the time of the issuance of the Regulation until September 11, 1943.

5. In holding that petitioners cannot assert deprivation of due process, because their protest was not filed until after September 11, 1943.

6. In holding that petitioners "proceeded to violate the Regulation without taking the steps which were open to them to protest its continued validity".

IV.

QUESTIONS PRESENTED.

1. Whether by reason of the enactment of §2(j) of the Emergency Price Control Act on July 16, 1943, an existing regulation not then satisfying the conditions imposed by §2(j), shall, on a complaint properly filed under §204(e)(1), be adjudged invalid from July 16, 1943, until the date on which the requirements of §2(j) were met, September 11, 1943.

2. Whether a complaint properly filed under §204(e)(1) of the Act, seeking such a judgment of invalidity, may be dismissed as not entitled to raise the same questions of due process as a protest filed under §203(a).

3. Whether a finding made by the District Court under §204(e)(1) of the Act that there was reasonable and substantial excuse for petitioners' not having filed a protest before September 11, 1943, (which finding was, in advance of its entry by the District Court, approved by the Emergency Court of Appeals in 148 F. 2d at p. 842) precludes the Emergency Court of Appeals from subsequently holding that petitioners were delinquent and that they therefore cannot assert deprivation of due process.

4. Whether the construction of the Act by the court below, requiring petitioners to have foreseen on July 16, 1943, that at some unknown time in the future the Administrator would make a determination under clause (3) of §2(j) of the Act, and also requiring petitioners to have foreseen the nature of such determination, has deprived petitioners of due process of law.

5. Whether the construction of the Act by the court below, as permitting a person to be indicted for alleged

violations of a regulation occurring before the regulation was amended to satisfy the requirements of §2(j) of the Act, violates the constitutional prohibition against *ex post facto* laws.

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The majority opinion of the court below construes §2(j)(3) of the Emergency Price Control Act in a way which deprives petitioners of due process of law and conflicts with the applicable decisions of this Court on the question of due process. The dissenting opinion of Judge Lindley points out that the decision conflicts with the pronouncements of this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *United States* v. *B. & O. R. Co.*, 293 U. S. 454; *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48; and *Mahler, et al.* v. *Eby Inspector in Charge Immigration Service, etc.*, 264 U. S. 32.

There is another important reason for the allowance of the writ:

A decision of the Emergency Court of Appeals in a companion case, *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, is under review by this Court in No. 67 at the present term. That case involves the construction of procedural provisions contained in §§203 and 204 of the Emergency Price Control Act, affecting the constitutional rights of all who are subject to price regulations. The present case arose directly out of the decision in the first case. In fact, it was initiated on the explicit suggestion

of the Emergency Court in 148 F. 2d at p. 842. Yet the result reached in the present case turns in part upon a wholly contradictory construction by the same court of the same procedural provisions. Therefore considerations affecting the outcome of No. 67 are inherent in the present case, and vice versa. Certain of the issues concerning due process in both cases can only be resolved by their consolidation.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Emergency Court of Appeals, to the end that this cause may be consolidated for hearing with No. 67 at the present term, and that both causes may be reviewed and determined by this Court as provided by the statutes of the United States; and that said judgment of the United States Emergency Court of Appeals may be reversed; and that such other relief may be granted as to this Court may seem proper.

November 3, 1945.

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinion Below

The opinion of the Emergency Court of Appeals (R. 50-55) is reported in Pike and Fischer, 3 OPA Opin. & Dec. 1071. It has not yet been reported in the Federal Reporter.

Jurisdiction

A statement of the basis for jurisdiction is set forth in the preceding petition, p. 9.

Questions Presented

These are set forth in the preceding petition, pp. 11-12.

Statutes and Regulations Involved

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in Appendix I, *infra*, pp. 27-33. The maximum price regulation involved and pertinent amendment thereto appear in the Federal Register (7 F.R. 9732; 8 F.R. 12554). The statement of reasons involved in the issuance of Supplementary Order No. 64 incorporates by reference the same reasons as those in the issuance of Supplementary Order No. 55, the latter statement being set forth in Appendix II, *infra*, pp. 35-42.

Statement of the Case

This will be found in the preceding petition, pp. 2-8.

Specification of Errors

The errors to be urged are specified in the preceding petition, pp. 9-10.

SUMMARY OF ARGUMENT

I

It is conceded by the Government that §1347.14(d) of MPR 30, by establishing a single maximum price for all types of unsorted wastepaper, regardless of grade, in terms of "No. 1 mixed paper", made use of a specification or standard obnoxious to clause (4) of the Taft Amendment, enacted July 16, 1943. From that date until September 11, 1943, the provision in question lacked statutory authority, because not until the latter date did the Administrator determine, pursuant to clause (3) of the Amendment, that no practicable alternative to standardization existed with respect to such commodity. There has never been any administrative determination that no practicable alternative to standardization existed between July 16 and September 11, 1943. Congress intended that the Taft Amendment should apply to regulations existing at the time of its enactment. Therefore the provision in question should, on a complaint properly filed under §204(e)(1) of the Act, be adjudged invalid from July 16 to September 11, 1943.

II.

To subject petitioners to penalties for alleged violations of a regulation, occurring at a time when the regulation was without statutory sanction, is to deprive them of due process of law. Petitioners cannot be denied the right to assert deprivation of due process upon the ground that they should have filed a protest under §203(a) of the Act before September 11, 1943, inasmuch as petitioners did file a timely protest under §203(a) and the only reason

they had to take recourse to §204(e)(1) was because of the construction of §203(a) made by the court below in 148 F. 2d 831, which construction is now under review in No. 67 at the present term. Moreover, the complaint under §204(e)(1) was predicated upon a finding by the District Court that there was reasonable and substantial excuse for petitioners not having filed a protest prior to September 11, 1943. In any event, a complaint under §204(e)(1) is entitled to the same considerations of due process as a protest under §203(a).

ARGUMENT.

I.

SECTION 1347.14(d) OF MAXIMUM PRICE REGULATION NO. 30 SHOULD BE ADJUDGED INVALID FROM JULY 16 TO SEPTEMBER 11, 1943.

A. During that Period it Failed to Meet the Express Requirements of §2(j) of the Act.

Section 1347.14(d) of MPR 30 was issued and in force prior to the passage of §2(j) of the Act (the Taft Amendment) on July 16, 1943. It is conceded by the Government that §1347.14(d), by establishing a single maximum price for all types of unsorted wastepaper, regardless of grade, in terms of "No. 1 mixed paper", made use of a specification or standard obnoxious to clause (4) of the Taft Amendment. This is because the specification or standard was not in general use in the trade or industry affected, and had not previously been promulgated and its use lawfully required by another Government agency.

The provision in question therefore became invalid upon the enactment of the Taft Amendment, in the absence of an express determination by the Administrator under clause (3) of the Amendment, that no practicable alternative to standardization existed for securing effective price control with respect to such commodity.

The validity of the Regulation prior to the passage of the Taft Amendment is not questioned. When it was originally issued, it did not have to meet the conditions imposed by Congress on July 16, 1943. From the time of the passage of the Amendment, however, and continuing until

September 11, 1943, there was wholly absent any statutory authority for the existence of the standardizing provision, since it was not until the latter date that the Administrator made the express determination required by clause (3) of the Amendment.

In making the determination requisite to validity on September 11, 1943, the Administrator spoke only as of that date. His determination was wholly silent as to whether a practicable alternative to standardization existed prior to September 11, 1943. The text of the determination itself explicity stated that it was made effective September 11, 1943, the day on which the determination was made. Therefore, the court below simply begs the question when it lets its decision rest upon the absolutely unfounded assumption that there was no practicable alternative to standardization prior to September 11, 1943; and when, having made that wholly unwarranted assumption, it erroneously goes on to say that the Regulation's validity "depended upon whether it could reasonably be said that the use of the specification or standard was the only practicable method for securing effective price control of unsorted waste-paper". Actually, the Regulation's validity *depended upon an express administrative determination*, as required by §2(j)(3), and not upon "whether it could reasonably be said, etc." The violence done to logical analysis of the issue by constant recurrence of these baseless assumptions, is evident throughout the majority opinion.

It would seem obvious that the Regulation was legally defective between July 16 and September 11, 1943 for the reasons pointed out by Judge Lindley in his dissenting opinion:

> If the legislature delegates to an executive or administrative body authority to promulgate regulations or enter orders, provided a certain administrative finding

or determination of existence of certain facts be made, the delegated authority fails in the absence of the requisite finding or determination. Mr. Chief Justice Hughes' announcement in *Panama Refining Co.* v. *Ryan*, 293 U. S. 409 at 432, is pertinent: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." And Mr. Justice Brandeis, in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, in discussing certain authority of the Interstate Commerce Commission, made similar comment, saying: "The Act * * * conferred authority, (on the Commission), to prescribe by rule, specific devices, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb'; * * * its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review * * * the order may be set aside unless it appears that the basic finding was made. * * * complete absence of the basic or essential findings required to support the Commission's order renders it void." See also *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48 and *Mahler et al.* v. *Eby Inspector in Charge Immigration Service, etc.*, 264 U. S. 32. In the latter case the court commented concerning a warrant of the Secretary of Labor that, inasmuch as it lacked the finding required by the Statute, it was invalid; that the defect went "to the existence of the power on which the proceeding rests,"

B. Congress Intended by Enacting §2(j) that Existing Regulations Should Not Have Validity Unless the Conditions Imposed by that Section Were Met.

The majority opinion says that to impute to Congress the intention of making the Taft Amendment immediately applicable to existing regulations within its purview is "unthinkable," because, it is claimed, the result would have been to disrupt the price control structure.

This interpretation of the situation existing on July 16, 1943 completely ignores the explicit statement of Congressional intention contained in the statement of the Managers on the part of the House in the Conference Report accompanying H. J. Res. 147 (H. Rep. 697, 78th Cong., 1st Sess., p. 3):

> The purpose of this amendment to section 2 of the Emergency Price Control Act of 1942, as amended, is to meet the objection that the Price Administrator has exceeded the limitations expressed in section 2(h) of that act in issuing *certain regulations already promulgated.* (Emphasis added.)

It is apparent from the foregoing that Congress was of the opinion that the Administrator himself had seriously disrupted the type of price control structure intended originally to be restricted by §2(h) of the Act. The views of Judge Lindley on this point as expressed in his dissenting opinion are:

> I can conceive of no justification for not declaring invalidity as of the time of the effectiveness of the amendment, lasting until the determination was made. Otherwise the Administrator might proceed to enforce the regulation in its original form, without making the determination required by the legislature. In such case Congress's mandate would become entirely meaningless.

> I think this reasoning should apply to existing regulations reflecting absence of the essential finding. The amendment having been enacted in an expressed desire to meet the objection that the Price Administrator had exceeded the limitations expressed in section 2(h) of that Act in issuing certain regulations already promulgated, *it would seem clear that Congress thought that previous to the amendment the Administrator had been going too far, and ordered him to desist unless and until he made a certain determination.* (Emphasis added.)

The language in the Conference Report bearing directly upon clause (3) of the Taft Amendment emphasizes that the required administrative determination was intended to be made a *condition precedent*. Thus it is said on p. 3 of the Report:

> The third clause requires that *before* any commodity may be standardized, the Administrator *must determine* that no practicable alternative method exists for securing effective price control of the commodity. (Emphasis added.)

In the concluding paragraph of the same statement it is said that the enactment of the provision in question makes clear "the circumstances under which the Administrator may act."

C. The Administrator Recognized on September 11, 1943, the Actual Intention of Congress.

That the making of the administrative determination is to be deemed a condition precedent to the effectiveness of any attempted standardization was recognized by the Administrator himself on September 11, 1943, in the statement of reasons involved in the issuance of Supplementary Order No. 64 (incorporating by reference the same as those for the issuance of Supplementary Order No. 55. See Ap-

pendix II, *infra*, pp. 35-42). The discussion in the latter document of the legislative history of clause (3) of the Taft Amendment unequivocally asserts that the Administrator has authority to establish standards only when he makes the required determination. Thus it is said in the fifth paragraph of the Administrator's statement:

> The clause recognizes the Administrator's authority to establish standards *whenever he determines* "that no practicable alternative exists for securing effective price control with respect to" a commodity. (Emphasis added.)

Again, in the fourteenth paragraph of the same document, it is recognized that the determination is a condition precedent to standardization:

> Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 *unless he can bring his action within the exception to clause 3 by making a determination* that no practicable alternative to standardization exists for securing effective price control. (Emphasis added.)

Indeed, the fact that the making of a determination is a condition precedent is declared in so many words by the Administrator in the sixteenth paragraph of the same document when he describes the requirement as a "*condition*" which must be "*met*" before effectuating standardization.

On this point Judge Lindley said in his dissenting opinion:

> Apparently the Administrator himself recognized the defect in his regulation resulting from the amendment and realized that he was required to make a determination, for he did so some two months after the amendment became law. But under the majority's view he

need never do so. Congress accomplished nothing by the amendment, if after its passage, a regulation could be enforced without compliance with the law.

II.

PETITIONERS HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW.

The concluding paragraph of the majority opinion deals with petitioners' contention, that to subject them to penalties for alleged violations of a regulation occurring at a time when the regulation was without statutory sanction, is to deprive them of due process of law.

It is true, as the court below says, that under *United States* v. *Pepper Bros.*, 142 F. 2d 340 (C.C.A. 3, 1944), a regulation may be enforced until it is declared invalid by the Emergency Court of Appeals. But in the present case, petitioners have not been convicted of violating the Regulation, and have been granted a stay by the District Court, under §204(e)(1) of the Act, for the purpose of permitting the Emergency Court to pass upon the validity of the Regulation. The present case could not have been initiated except upon the District Court's finding that there was reasonable and substantial excuse for petitioners' not having filed a protest prior to September 11, 1943.

Accordingly, the situation is entirely different than the one in *Yakus* v. *United States*, 321 U. S. 414, 447, which is cited in the majority opinion. In the *Yakus* case the defendants had filed no protest under §203(a), and did not have available to them the remedy provided by §204(e)(1), which was not enacted until later. Petitioners, however, did file a protest under §203(a); and the only reason they had to take recourse to §204(e)(1) was because of the con-

struction of §203(a) made by the court below in 148 F. 2d 831. This construction is now under review in No. 67 at the present term. Under the circumstances it is indeed startling to find the court below denying petitioners the right to assert deprivation of due process on the ground that "they proceeded to violate the regulation without taking the steps which were open to them to protest its continued validity." Judge Lindley concurred in 148 F. 2d at p. 842 because he believed §204(e)(1) afforded petitioners due process. He was constrained to dissent in the present case because the result reached by the majority renders worthless the provisions of §204(e)(1).

The majority opinion paradoxically holds that "time was obviously required for investigation and consideration" by the Administrator as to whether there was a practicable alternative to the standardization otherwise prohibited by §2(j) of the Act, and that consequently the Administrator "acted with reasonable promptness in making his determination as to MPR 30 in less than two months after the Taft Amendment became law", but would require petitioners to have known on July 16, 1943, whether or not there was a practicable alternative and "to form an intelligent judgment as to the effect of the Taft Amendment upon the regulation". The unsoundness of this position is emphasized in Judge Lindley's dissent:

> From and after the effective date of the amendment, complainants, as well as others in the industry, had no fore-knowledge of what the Administrator might determine in this crucial respect, or indeed, whether he would ever make any determination of any character; yet the majority would require them to divine what the Administrator would do, and, if they did not foresee what was going to happen, to act at their peril with danger of subjecting themselves to criminal prosecution and a penalty of treble damages. This, I think,

far beyond the intent of Congress; nor does it comport with my conception of due process of law.

To illustrate the extremes to which the majority opinion would carry us, let us assume that the Administrator had not made the essential determination for a year after the Congress enacted the requirement for a determination and yet had prosecuted complainants within that period for violation of the unamended regulation. Then, under the reasoning of my brethren they could be convicted and sentenced and execution of the sentence satisfied, all before the Administrator made the determination which Congress had mandatorily made essential to validity of the regulation. And if the regulation were valid for two months or three months or a year or two years without any determination it might just as logically always be valid. Under this reasoning, respondent need never make a determination, though Congress has directed him to do so.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the case should be consolidated with No. 67.

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
JACK H. OPPENHEIM,
Of Counsel.

November 3, 1945.

APPENDIX I.

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, are as follows:

SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[3]

* * * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[4] any person subject to

[3] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

[4] As amended by sec. 106 of Stablization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[5] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[6] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. If the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within

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[5] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[6] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same; and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request

by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this

section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b),

(c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective

in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[7]

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[7]Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

APPENDIX II.

[STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 64]

OFFICE OF PRICE ADMINISTRATION

STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 64

The reasons for the issuance of this supplementary order are the same as those for the issuance of Supplementary Order No. 55 and the latter are incorporated herein by reference.

Issued this 11th day of September 1942.

CHESTER BOWLES,
Acting Administrator.

[STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 55]

OFFICE OF PRICE ADMINISTRATION

Statement of the Reasons Involved in the Issuance of Supplementary Order No. 55 Amendment of Preamble of Certain Maximum Price Regulations Covering Grocery Products and Tobacco with Respect to Use of Specifications or Standards.

The Taft Amendment to the Emergency Price Control Act of 1942 restricts the power of the Administrator to make use of standards in price regulation. The Amendment, contained in House Joint Resolution No. 147 which continued the Commodity Credit Corporation, adds a new paragraph (j) to Section 2 of the Emergency Price Control Act of 1942. The standards provisions are contained

in clauses (3) and (4) of this paragraph which provide as follows:

> "(3) Nothing in this Act [i.e. the EPCA] shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

To determine whether and to what extent the price regulations issued by the Office of Price Administration conform to the "standards" requirement of the Taft Amendment, the Administrator has caused every price regulation to be carefully scrutinized. Supplementary Order No. 55, which this Statement accompanies, amends the preamble of the price regulations covering grocery products and tobacco E. H. P. by adding appropriate findings of compliance with the Amendment, wherever this may be done. Similar orders are being issued with respect to other price regulations issued by the Office of Price Administration. In addition, a separate supplementary statement of considerations is being issued for each regulation justifying the finding that the regulation complies with the Amendment. Appropriate amendments will be issued to those price regulations in which a finding cannot be made of compliance with the "standards" provisions of the Taft Amendment.

Since doubts have been expressed as to the exact meaning of the "standards" provisions, it is appropriate that the Price Administrator state his views as to their meaning and intent and the basis upon which he has acted in determining whether the price regulations issued by this Office conform to the requirements of the provisions.

> Clause 3 of the Taft Amendment states that "Nothing in this act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine with respect to such standardization, that no praticable alternative exists for securing effective price control with respect to such commodity.

Although as was pointed out by Senator Taft, "the word 'standardization' which went into the amendment was not thought of or debated particularly" (*Cong. Rec.*, July 6, 1943, at p. 7327), it is clear from the legislative history and context of the clause that to "standardize" was considered as meaning, broadly, to establish standards or to require conformity to standards.

Thus, for the purposes of price control, the Administrator "standardizes" a commodity—that is, establishes standards for it—whenever he bases ceiling prices upon standards or specifications which were not previously established either by general industry usage or by the action of another Government agency. The clause recognizes the Administrator's authority to establish standards whenever he determines "that no practicable alternative exists for securing effective price control with respect to" a commodity.

The Administrator, however, does not "standardize" a commodity merely by basing ceiling prices for it upon standards, when the commodity had already been stand-

ardized either by the general and voluntary use of those standards in the industry or by the action of another Government agency requiring their use.

When the Price Administrator requested the relaxation of the prohibition against standardization contained in the War Agencies Appropriation Bill, which unqualifiedly prohibited the Administration from "requiring * * * standardization", he accepted this understanding of "standardize." He did this explicitly by accompanying the proposal that he retain power to standardize when essential to effective price control with a suggested clarifying provision declaring that "no order * * * shall be deemed to require standardization" because it fixes maximum prices for different kinds, classes or types of a commodity described in terms of standards or specifications which were "in substantial use in the * * * industry affected" or were established by another Government agency. For text, see *Cong. Rec.*, July 6, 1943, at p. 7326.

The Administrator's proposal was accepted without change as an amendment to the Commodity Credit Corporation Bill by the Senate Committee on Banking and Currency. Although the committee amendment was subsequently modified on the floor, nothing in the changes which took place, or in the history of the provision either in the Senate or the House, suggests any other understanding of the basic concept of standardization.

> Clause 4 of the provisions states that "Nothing in this Act shall be construed * * * (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards under such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously

been promulgated and their use lawfully required by another Government agency."

This clause had its origin in the provision which the Administrator proposed to amend to the clause (now clause 3) giving him power to standardize where essential for effective price control. The purpose of this provision was to make clear that the action it described—the setting of maximum prices on the basis of standards already established—was *not* standardizatipn. In the form proposed by the Administrator the clause was approved by the Senate Banking and Curency Committee in a report submitted by Senator Wagner (for himself and Senator Taft). *Senate Report, No.* 387, 78th Cong., 1st Sess., July 3, 1943. In this report, the action described in the clause was treated as wholly distinct from standardization. *Id.*, at p. 3.

The form of the clause was changed as a result of an amendment offered from the floor by Senator Taft. He stated that the amendment had the approval of the Administrator and presented it as meeting the objections which the Administrator had raised to the proviso in the Appropriation Act which prohibited outright any order "requiring • • • standardization." The purpose of the amendment seems to have been to prevent the claim that pricing by reference to types of standards, *other than those specified in the clause*, would not be "standardizing" and hence would not be subject to the limitations in clause 3. The change in form resulting in forbidding the Administrator to price by standards, when he had not established the standards in the manner permitted by clause 3, unless the standards were of the particular kinds which clause 4 specifies. Had Senator Taft intended to confine the Administrator's power to make use of standards to commodities already standardized, and thus to deny the Adminis-

trator's own power to standardize, his amendment would have been a reiteration of the proviso and could not possibly have been supposed to satisfy the objections to that proviso which the Administrator had expressed.

In explaining the amendment, Senator Taft said: "The amendment as I now offer it is only slightly different from the committee amendment." *Cong. Rec.*, July 6, 1943, at p. 7327. In addition to the change already noted, the modified amendment tightened the committee amendment in two other respects. It required that industry standards, if they were to be a basis of action under clause 4, should have been in "general", not merely "substantial," use, and that standards promulgated by another Government agency should be standards which the agency had lawfully required to be used. These three changes were not improperly described as "slight". No such description could have been made of a change which deprived the Administrator of any power to establish new standards, however essential to price control, and which, in so doing, invalidated scores of outstanding maximum price regulations.

The statement of the managers on the part of the House pointed out that the Taft Amendment warranted "the repeal of the somewhat broader limitations recently included in the National War Agencies Appropriations Act of 1944, to which the Administrator objected." The characterization of the Taft Amendment as imposing narrower limitations than the appropriation proviso would not be true if clause 4 nullified clause 3.

Some uncertainty has been expressed as to the meaning of the Taft Amendment because of two statements which appear in the managers' statement:

1. In describing the effect of clause 4, the managers state: "But requirements that standards or specifications

may be used in manufacturing or selling, or that such standards appear on the invoice, are prohibited" except where the standards meet the conditions specified in clause 4. Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 unless he can bring his action within the exception to clause 3 by making a determination that no practicable alternative to standardization exists for securing effective price control.

2. The managers also state: "Each of these four limitations [the four clauses] is made separately applicable to the issuance of maximum price regulations." The purpose of this observation seems to have been to reassure those who, like Senator Vandenberg (See *Cong. Rec.*, July 6, 1943, at p. 7327), feared that the Administrator might attempt to exercise his power to standardize so as to impair trade and brand names or to reintroduce grade labeling. The statement indicates that compliance with the exception in clause 3 will not justify action in violation of clause 1 or 2 which relate to trade and brand names and grade labeling. It does not indicate that clause 4 defeats clause 3. Clause 1 had its origin in a purpose to indicate actions which *were not subject* to clause 3, and the distinction between the actions subject to each clause was consistently maintained during the bill's history. It cannot be said that clause 4 governs actions which *are subject* to clause 3 and so limits them as in effect to nullify the power to standardize which the exception in clause 3 permits.

As a result of this analysis of the language of the Taft Amendment and its legislative history, the Administrator has reached the conclusion that he may properly issue price regulations in which prices are based on or calculated by

reference to standards or specifications only if one of the following conditions is met:

1. The standards or specifications were, prior to their use in the regulation, in general use in the industry.

2. The use of the standards or specifications was, prior to their use in the regulation, lawfully required by another Government agency.

3. The Administrator has determined that no practicable alternative to using the standards or specifications exists for securing effective price control.

This conclusion accords with the President's understanding of the meaning of the Taft Amendment, as stated by the President when he signed the Commodity Credit Corporation bill. The President stated that a construction which would prohibit "the Administration from making use of standards in any case regardless of how essential they were to price control unless such standards had been previously established by industry acceptance or trade acceptance" would "cripple price control". The President declared that he signed the bill with the understanding that the Taft Amendment "preserved power in the Administrator to 'standardize' a commodity in any case on which this was absolutely essential to an effective system of fixing prices."

Issued this 11th day of September, 1943.

CHESTER BOWLES,
Acting Administrator.